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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PROTECT OUR HOMES AND HILLS et al.,

Plaintiffs and Appellants,

v.

COUNTY OF ORANGE et al.,

Defendants and Respondents;

YORBA LINDA ESTATES, LLC,

Real Party in Interest and Respondent.

G057422

(Super. Ct. No. 30-2015-00797300)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, William D. Claster, Judge. Affirmed.

Kevin K. Johnson, and Kevin K. Johnson; Shute, Mihaly & Weinberger and Gabriel M.B. Ross for Plaintiffs and Appellants.

Leon J. Page, County Counsel, and Nicole M. Walsh, Deputy County Counsel for Defendants and Respondents.

Remy Moose Manley, James G. Moose and Nathan O. George for Real Party in Interest and Respondent.

* * *

This appeal calls on us to once again assess the County of Orange's (County) compliance with the California Environmental Quality Act, Public Resources Code section 21000 et seq. (CEQA), in connection with a hillside residential development project (Project) adjacent to a state park and the City of Yorba Linda. After a partially successful appeal by Protect Our Homes and Hills and others (collectively, Protect), the trial court issued a preemptory writ of mandate directing the County to vacate its prior certification and approvals, and to take certain steps to remedy defects in the final environmental impact report (FEIR) for the Project identified by this court. The County acted, and the County Board of Supervisors eventually certified a second revised final environmental impact report (second revised FEIR) and approved the Project once again. Based on evidence presented by the County, the trial court concluded the County complied with the terms of the writ and ordered it discharged.

Protect appeals, contending discharge of the writ was error. It argues substantive defects concerning the Project's environmental setting, water supply availability and fire hazard mitigation remain despite the County's attempt to correct them. Additionally, it argues the County failed to follow certain required procedures specified in CEQA and the CEQA Guidelines[1] prior to certifying the second revised FEIR. We find no merit in any of these contentions and affirm the discharge order.

[1] All references to the "CEQA Guidelines" are to the state regulations which implement the provisions of CEQA. (Cal. Code Regs., tit. 14, § 15000 et seq.).

## FACTUAL AND PROCEDURAL BACKGROUND[2]

Years ago, developer and real party in interest Yorba Linda Estates, LLC (the developer), initially proposed to build a 340 single family home Project on a previously undeveloped site in an unincorporated area of Orange County. In accordance with CEQA and the CEQA Guidelines, the County performed an initial study which led to preparation of an environmental impact report (EIR). After preparing and circulating a draft EIR (DEIR) for public review and comment, the County Board of Supervisors eventually certified the FEIR for the Project, adopted a statement of overriding considerations concerning its significant unavoidable impacts, adopted a mitigation monitoring and reporting program, and granted the desired Project approvals.

Protect filed a petition for writ of mandate challenging certification of the FEIR and the land use approvals. The CEQA-related allegations in the petition concerned, inter alia, the Project description, the analysis of cumulative impacts, aesthetics, air quality, biological resources, geology and soils, wildland fire hazards, greenhouse gas emissions, recreation, traffic, noise, and water supply availability, and the purported deferral of mitigation of various significant impacts to a later time.

The trial court only found merit in Protect's arguments concerning the FEIR's greenhouse gas analysis and the related discussion of impact mitigation. It entered judgment and issued a corresponding preemptory writ of mandate (first writ). Among the steps the first writ directed the County to take were vacation of the FEIR's certification and all Project approvals, revision of the FEIR to bring it into compliance with CEQA by resolving the deficiencies identified by the trial court's statement of

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[2] The abbreviated facts provided in this opinion focus on matters relevant to the instant appeal. More detailed facts relating to Project and the County's initial approval of it are found in our opinion addressing the underlying merits of Protect's writ petition. (*Protect Our Homes & Hills v. County of Orange* (Oct. 13, 2017, G054185) [nonpub. opn.] (*Protect I*).)

decision, and consideration of whether to certify the revised FEIR and grant Project-related approvals.

Protect appealed. This court affirmed the trial court's judgment, in part, and reversed, in part. (*Protect I, supra*, G054185.) We concluded the FEIR did not contain the requisite accurate and stable description of the Project's environmental setting, specifically its location in relation to the adjacent Chino Hills State Park (CHSP), and it failed to properly analyze water supply availability and to adequately mitigate fire hazard impacts. We remanded the matter to the trial court, ordering it to modify the judgment and issue another preemptory writ of mandate (second writ) directing the County to take steps similar to those specified in the first writ to correct the additional deficiencies we identified. (*Ibid*.)

While the first appeal was pending, the County took actions which it believed were in compliance with the first writ, including certifying a revised final EIR (revised FEIR). It successfully sought an order from the trial court discharging that writ, but Protect appealed. We partially reversed the corresponding judgment, finding there was no evidence in the record supporting the revised FEIR's conclusion that a certain method of mitigating greenhouse gas impacts was infeasible. (*Protect Our Homes & Hills v. County of Orange* (May 8, 2019, G055716) [nonpub. opn.].)

In the meantime, the trial court issued the second writ, directing the County to take certain additional steps concerning the Project's CEQA documents and approvals. The directives were similar to those of the first writ, and they included a mandate that the County "revise the [revised FEIR] for the Project in accordance with CEQA, the CEQA Guidelines, the Court of Appeal opinion [in the first appeal], the [a]mended [j]udgment and this [w]rit, to bring the [revised FEIR] into compliance with CEQA by correcting and resolving the deficiencies identified by the Court of Appeal in its opinion."

The County once again acted. Its Board of Supervisors vacated the resolutions which certified the revised FEIR and granted the related Project approvals.

County staff gathered supplemental facts, assessments and reports from a variety of consultants, and used them to produce a document titled, "2018 Additional Environmental Analysis" (2018 AEA). Included in the 2018 AEA are revisions to sections of the revised FEIR concerning existing conditions adjacent to the Project site, water demand analysis, and a community evacuation plan. The document claims the County determined the types of changes required and made all necessary revisions, and each subpart concludes the revised FEIR's ultimate finding of less than a significant impact in each of the relevant subject areas remains true despite the new revisions.

The County Planning Commission and Board of Supervisors held public meetings concerning the second revised FEIR for the Project.[3] As in the past, they received many comments from the public and other government agencies and entities. Among them were written letters from the developer, providing responses to some of the comments from others, including Protect. Nothing in the record indicates the County or a County consultant responded to the comments.

Ultimately, the County Board of Supervisors certified the second revised FEIR, adopted a statement of overriding considerations and a mitigation monitoring and reporting program, and granted the related land use approvals.

Thereafter, the County filed a return to the second writ in the trial court, contending it complied with all the writ's terms and requesting the court issue an order

[3] According to the record, the second revised FEIR consists of the following: "(i) [the] DEIR . . . [;] (ii) the [r]esponses to [c]omments which includes a list of persons, organizations, and public agencies commenting on [the] DEIR . . . and the [revised ]FEIR along with the letters and emails received from such commenters, public meeting testimony, and corresponding responses to comments[;] (iii) revisions to [the revised ]FEIR . . . by the [second revised ]FEIR reflecting changes made in response to comments, and to the [trial] [c]ourt's orders, [j]udgment and [a]mended [j]udgment . . . , and other information as detailed in the [r]esponse to [c]omments [e]rrata and the Additional Environmental Analysis dated February 21, 2017 ("2017 AEA") and the [2018 AEA;] and (iv) all attachments and documents incorporated by reference into [the] DEIR . . . , the [revised ]FEIR, the 2017 AEA and the 2018 AEA."

discharging it. Protect opposed the motion, asserting the County (1) failed to fully remedy the defects identified by this court in the first appeal, (2) failed to formally recirculate the second revised FEIR as required by CEQA and the CEQA Guidelines, and (3) erroneously relied on third party comments to support its findings and conclusions without first independently reviewing and exercising its independent judgment concerning the thoughts expressed therein.

The trial court held a hearing, took the matter under submission, and subsequently issued a detailed ruling granting the County's discharge motion. It concluded the County fully complied with the writ by revising 27 maps to accurately depict the complete boundary of CHSP in relation to the Project site, "confirming in a non-conclusory manner that the impacts on the full area of CHSP [were] analyzed[,]" analyzing and calculating water use for all aspects and phases of the Project, replacing the deficient hazards mitigation measure with additional mitigation measures which set forth performance standards for the content of the community evacuation plan, and supporting its conclusions with substantial evidence, as needed. The court also found substantial evidence supported the County's decision that recirculation of the second revised FEIR was not required under the circumstances, and it determined it was not improper for the County to rely on information and conclusions submitted to the Board of Supervisors by the developer.

An order discharging the second writ followed, and Protect timely appealed.

## DISCUSSION

Protect challenges the trial court's discharge of the second writ. From its perspective, the County failed to comply with the second writ's requirements that (1) the three substantive defects in the FEIR be remedied, and (2) the process for remedying the defects be consistent with CEQA and the CEQA Guidelines. On the record before us, we

conclude the trial court did not err in discharging the second writ because the County demonstrated full compliance with the second writ.

*Standard of review*

"On appeal from an order discharging a [preemptory] writ [of mandate], the issue is whether the trial court erred in ruling that the respondent . . . complied with the writ." (*Los Angeles Internat. Charter High School v. Los Angeles Unified School Dist.* (2012) 209 Cal.App.4th 1348, 1355.) Because assessment of compliance with a writ in the present context involves determining whether the County "has complied with [CEQA]" (Pub. Resources Code, § 21168.9, subd. (b)), the usual standard of review applicable in CEQA cases is implicated. (See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 563-564; *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 467-468.)

"In reviewing a . . . challeng[e] [to] the legality of a lead agency's actions under CEQA, . . . [w]e review the agency's actions, not the trial court's decision[.] . . . [O]ur inquiry extends 'only to whether there was a prejudicial abuse of discretion' on the part of the agency." (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 923.)

"'[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. [Citation.]'" (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935 (*Banning Ranch*).) "Judicial review of these two types of error differs significantly" (*ibid*.), thus a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236.) "'While we determine de novo whether the agency has employed the correct procedures, "scrupulously enforc[ing] all legislatively mandated

CEQA requirements" [citation], we accord greater deference to the agency's substantive factual conclusions.'" (*Banning Ranch*, at p. 935.) Accordingly, in reviewing factual conclusions, we do "'"not to weigh conflicting evidence and determine who has the better argument[,]"'" meaning we "'"may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable[.]"'" (*Ibid.*)

*Challenges concerning substance of the revised Project documents*

The second writ ordered the County to remedy the three deficiencies identified by this court in the first appeal—one concerning the description and depiction of the CHSP area surrounding the Project site, another concerning water supply and demand, and the last concerning mitigation of potential fire hazard impacts. Each of these topics is discussed in the second revised FEIR and the appended technical analyses, yet Protect contends the substantive discussions do not cure the prior FEIR's shortcomings. We disagree.

*A. Description and Depiction of CHSP*

"Without accurate and complete information pertaining to the setting of the project and surrounding uses, it cannot be found that [an] FEIR adequately investigated and discussed the environmental impacts of the development project." (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729 (*San Joaquin Raptor*).) Thus, "[i]f the description of the environmental setting of the project site and surrounding area is inaccurate, incomplete or misleading, the EIR does not comply with CEQA." (*Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 87 (*Cadiz*).)

On this basis, we found in the first appeal the County failed to comply with CEQA. Although certain maps in the FEIR accurately depicted the location of CHSP as

bordering the entire northern and eastern boundaries of the Project site, numerous maps showed CHSP lying north and east of only the northern portion of the site. One of the inaccurate maps was the Project "vicinity map," a map which was not only included in the FEIR, but was also the only map included in the public notices of availability for both the DEIR and the FEIR. As a result of the significant discrepancy, we concluded "the FEIR's inaccurate and unstable information concerning the Project's environmental setting '"'preclude[d] informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.'" [Citation.]' (*Banning Ranch Conservancy, supra*, 2 Cal.5th at p. 942.)" (*Protect I, supra,* G054185, at p. 12.)

Protect acknowledges the County revised the inaccurate maps such that all maps in the second revised FEIR correctly depict the complete location and orientation of CHSP relative to the Project site. It nevertheless contends the County failed to fully comply with the second writ because it did not "re-analyze the Project's impacts in light of the corrected information[.]" The particular impact categories on which it focuses are aesthetics, biological resources and land use. We take each in turn.

The second revised FEIR concluded the FEIR fully analyzed the Project's potential aesthetic impacts in relation to CHSP and no further studies or revisions were needed. To support the conclusion, it explained the FEIR's long term view simulation locations were chosen in consultation with California State Park personnel and noted that four of the views studied correspond to locations in CHSP they specifically requested. In addition, the second revised FEIR listed the previously analyzed mitigation measures and project design features which will minimize direct and indirect light pollution on land surrounding the Project site, including all adjacent areas of CHSP.

The addition of new factual information to an EIR does not necessarily mean new analysis is required. Each situation is circumstances dependent. Here, by explaining why the components of the prior aesthetics analysis remain equally applicable

notwithstanding changes made to many of the maps, the County provided substantial evidence to support its conclusion that no supplemental analysis was needed.

The same is true concerning biological resources. The second revised FEIR stated that "despite the mapping deficiencies identified by [this court], the environmental impact analysis conducted for the [P]roject was done with full knowledge of the correct boundaries of CHSP." It explained the biological report appended to the FEIR referenced the correct acreage of CHSP and accurately described its location—north and east of the Project site. As we noted in the first appeal, those general north and east descriptors, alone, were insufficient to support the FEIR's analysis because they were rendered ambiguous by the numerous inaccurate maps. But the second revised FEIR included additional information not present in the record in the first appeal. Specifically, in an e-mail response to comments from CHSP staff concerning a need to update the maps depicting the park, a developer representative explained that its position had always been "that all of the land directly east of [the Project] is part of [CHSP], and that is what was analyzed in the DEIR." With this clarification, there is substantial evidence in the record to support the conclusion that no further biological studies or analysis was needed, notwithstanding the map corrections.

Protect's last criticism concerning CHSP relates to the second revised FEIR's conclusion the Project is consistent with the CHSP General Plan. Specifically, Protect faults the County for "fail[ing] to acknowledge that the entire [P]roject site has been identified [by the California Department of Fish and Wildlife] as . . . an acquisition candidate"—i.e. land contemplated for future addition to CHSP's conservation area.

But Protect overstates the record evidence and its impact on the County's CEQA obligations. The only evidence of the state's purported interest in acquiring the Project site for addition to CHSP is a letter submitted to the County by Protect's legal counsel, attached to which is a map labeling the Project site as a proposed addition. Notably, the map bears the logo of one of the petitioners in this case and there is no

evidence the California Department of Fish and Wildlife or some other State agency created or published it. Even if it were an official document, the mere fact that the Project site could possibly be acquired by the state at some unidentified time in the future does not mean the Project is inconsistent with the existing CHSP general plan. CEQA does not require a lead agency to evaluate every theoretical scenario, particularly ones that are extremely speculative. (See *Marin Mun. Water Dist. v. KG Land California Corp.* (1991) 235 Cal.App.3d 1652, 1662-1663.)

For these reasons, we conclude the trial court did not err in determining the County fully complied with the second writ in relation to CHSP.

*B. Water Supply and Demand*

The FEIR concluded there would be sufficient water supply to serve the Project, along with the demands of other Yorba Linda Water District customers. We found that conclusion was not adequately supported by information and analysis because the FEIR lacked any discussion of the Project's construction phase water demand and operational water demand for common areas, including roughly 13 acres of active and passive parks, fountains and a babbling brook, and fruit tree groves. (*Protect I*, *supra*, G054185, at pp. 20-22.)

In response, the developer obtained reports from various consultants which estimated water use for various phases and aspects of the Project. Among the estimates were water demand for the Project's two-phased construction, for each residential lot's domestic and landscape use, and for Project common areas, including special maintenance areas, parks, fuel modification zones and mitigation areas. Based on the new calculations, the second revised FEIR found total projected long-term water demand for the Project will be less than the prior incomplete estimate, and it concluded water supply will be sufficient to serve the Project throughout its various phases.

Protect contends the revised analysis fails to remedy the previously identified deficiency because it uses estimates "based on lot and residence sizes smaller than the actual Project" and it "omit[s] multiple . . . key water demand components, including high volume water features and landscape trees[.]" Neither argument has merit.

To estimate long-term residential water demand, the second revised FEIR relied on a 2016 executive report concerning a Municipal Water District of Orange County reliability study. Based on historical water use in the Yorba Linda Water District service area, the report concluded average single-family residential water use is 586 gallons per day per dwelling unit, including landscape water. Although Protect and its experts disagreed about whether it was appropriate to use that value to estimate future use on the Project site in light of purported lot and residence size discrepancies, the disagreement amounted to nothing more than a battle of the experts. Disagreement among experts does not make an EIR inadequate. (*Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 349 (*Atherton*).) And absent evidence the lead agency's chosen method is clearly inadequate or unsupported, evidence which we do not have here, we will not critique or assign our own weight to competing experts. (See *id.* at pp. 349-350.)

As for the alleged omission of water use associated with key common area components, such as trees and water features, the record reveals no evidence of any such oversight. The consultant report on which the additional water analysis was based explains the method used to calculate total landscape water usage. Among the steps were the calculation of the square footage of each irrigated area, an accounting of the various plant palettes and uses in each area specified in the Specific Plan for the Project, the determination of water use factors for each component using industry standards and experience, and the final calculation of total projected water use.

While the tables included in the consultant's report and the body of the County's analysis indicated zero square feet of "medium water use tree," and contained no other category expressly referencing trees or water features, the seeming gap is filled elsewhere. The documents stated the anticipated landscape palette was divided into low, medium, and high water use, and approximately 99,500 square feet of irrigated park area will consist of "high water use turf and the water features near the entrance to the Project." And in response to public comments, the developer's representative confirmed "[t]he trees, fountains, turf and brook are all categorized as high water uses in the park landscape estimates."

Consequently, the trial court did not err in concluding the County complied with the water related aspect of the second writ.

*C. Mitigation of Potential Fire Hazard Impacts*

In the first appeal, we concluded the County impermissibly deferred fire hazard evacuation related mitigation because one of the mitigation measures on which it relied to conclude impacts would be less than significant did not contain specific and mandatory performance standards. As we explained, Mitigation Measure Haz-6 (MMH6) mandated the development of a community evacuation plan (CEP) for review by the Orange County Sheriff's Department and the Orange County Fire Authority, and approval by the latter. Although it required the CEP contain certain categories of information, it failed to have any direct or indirect standards to guide the approval process.

After the second writ issued, the County chose to remedy the identified deficiency by eliminating MMH6 and replacing it with 17 new mitigation measures. The County contends the new measures satisfied the writ's demands because they provided the "specific performance standards that must be incorporated into the CEP for the Project." We agree.

The newly added mitigation measures cure the prior improper deferral. Topics addressed range from emergency preparedness education and fuel modification to access routes. Many measures contain concrete requirements, and those that require future approvals incorporate standards on which the future approvals are conditioned.

Criticizing the new mitigation measures, Protect asserts they "add nothing to the previous EIR regarding the safe evacuation of the **residents** of [the Project site]." Among the details it contends the mitigation lacks are the specific location of on-site safe refuge sites, optimal timing criteria for a successful evacuation, means of avoiding traffic "choke points" in the event of an evacuation, and evacuation protocols for different potential fire scenarios.

Setting aside the underlying accusation, Protect's grievance is misplaced. Former MMH6 was designed to address the impact threshold question of whether the Project would "impair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan." The FEIR answered the question in the negative in light of MMH6's adoption. The second revised FEIR reaches the same conclusion, and Protect does not claim the record lacks sufficient evidence to support it.

Instead, Protect's argument appears more directed at the entirely separate impact threshold question of whether the Project would "[e]xpose people or structures to a significant risk or loss, injury or death involving wildland fires[.]" The FEIR relied on different mitigation measures to conclude impacts in this topical area would be less than significant. Protect challenged the County's analysis in the first appeal, arguing the County erroneously failed to include data and analysis regarding various aspects of resident evacuation during a fire. But we rejected its argument and found the scope of FEIR's analysis met CEQA's standards. (*Protect I, supra,* G054185, at pp. 12-15.) Protect may not resurrect its unsuccessful challenge under the guise of an objection to the County's attempt to remedy improperly deferred mitigation. (See *Atherton, supra,* 228

Cal.App.4th at p. 354 [collateral estoppel precludes relitigation of issues argued and decided on merits in prior proceeding which is final].)

Because the County remedied the improper deferral of mitigation, the trial court did not err in concluding it complied with the related portion of the second writ.

*Challenges concerning Project reapproval process*

The second writ ordered the County to act in compliance with CEQA and the CEQA Guidelines. Protect contends the County failed to do so, arguing (1) it should have recirculated the second revised FEIR prior to certifying it and reapproving the Project, and (2) it erroneously relied on information and analysis from the developer to satisfy CEQA's mandates without first exercising independent review and judgment over the material. We find no error.

*A. Recirculation*

Once a draft EIR has been circulated for public review, CEQA generally does not require an additional period of public circulation before the lead agency may certify the final EIR. The limited exception is when the agency adds "significant new information" to an EIR after close of the draft EIR comment period. (Pub. Resources Code, § 21092.1; CEQA Guidelines, § 15088.5, subd. (a); *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1124.) In such circumstances, the EIR must be recirculated for additional public review and comment prior to certification. (Pub. Resources Code, § 21092.1; CEQA Guidelines, § 15088.5, subd. (a).)

In this context, "information" may include not only changes in the project or environmental setting, but also additional data or other added information. (CEQA Guidelines, § 15088.5, subd. (a).) But to be considered "significant," the new information must change the EIR "in a way that deprives the public of a meaningful

opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement." (CEQA Guidelines, § 15088.5, subd. (a).) Examples include information showing: "(1) [a] new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented[;] [¶] (2) [a] substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance[;] [¶] (3) [a] feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it[; or] [¶] (4) [t]he draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (CEQA Guidelines, § 15088.5, subd. (a).) If the new information "merely clarifies or amplifies or makes insignificant modifications in an adequate EIR[,]" recirculation is not required. (CEQA Guidelines, § 15088.5, subd. (b).)

The County considered whether recirculation was necessary by evaluating the above factors. The second revised FEIR explained the revisions did not identify any new environmental impacts, did not reveal an increase in severity of any impacts, and did not identify any feasible alternatives or mitigation measures the developer declined to adopt. Accordingly, it concluded "[t]he changes made to the [revised ]FEIR by the [second revised ]FEIR . . . do not meet the criteria for recirculation under CEQA §15088.5[.]" Again, we agree.

Rather than contest whether substantial evidence supported the County's determination,[4] Protect appears to contend recirculation was required as a matter of law. It reasons that because this court concluded in the first appeal the omissions from the FEIR were prejudicial because they impaired the document's informational function, recirculation of the second revised FEIR "was unquestionably required."

Protect cites no authority, and we have found none, standing for the proposition that a finding of prejudicial error due to an omission of content from an EIR necessarily requires recirculation of the document after revision and before certification. There is good reason for the want of authority. Neither CEQA nor the CEQA Guidelines contemplate recirculation whenever prejudicial noncompliance with CEQA is found on appeal. Rather, they confine required recirculation to those situations in which "significant new information" is added to an EIR. (Pub. Resources Code, § 21092.1; CEQA Guidelines, § 15088.5; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1112 [legal standards governing recirculation of EIR prior to certification apply equally to revised EIR modified due to court-identified deficiencies].) And again, by definition, to be considered "significant," new information must "deprive[] the public of a meaningful opportunity to comment upon" a new significant environmental impact, a nonmitigable substantial increase in severity of an impact, or a feasible alternative or mitigation measure declined by the project proponent. (CEQA Guidelines, § 15088.5, subd. (a).) This is necessarily a case-by-case fact-based inquiry, hence the substantial evidence standard of review applies in the trial court and on appeal. (CEQA Guidelines, § 15088.5, subd. (e); *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 655.) Here,

[4] For the first time in its reply brief, Protect claims the County's decision not to recirculate the second revised FEIR is not supported by substantial evidence. The issue was not raised in a timely manner and, accordingly, we do not consider it. (*Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1022.)

substantial evidence shows the second revised FEIR did not contain any such significant new information.

In short, Protect does not demonstrate error in the trial court's determination recirculation of the second revised FEIR was not required.

*B. Independent review and judgment*

"When an EIR is required, the lead agency is responsible for preparing it, but rather than preparing it using its own staff, the agency may enlist the initial drafting and analytical skills of an applicant's consultant [citations], so long as the agency applies its 'independent review and judgment to the work product before adopting and utilizing it.' [Citations.]" (*Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 369 (*Eureka*).) Thus, before approving a project for which an EIR was prepared, among the matters the lead agency must certify is that "[t]he final EIR reflects the lead agency's independent judgment and analysis." (CEQA Guidelines, § 15090, subd. (a).)

Protect acknowledges CEQA's relative flexibility concerning who prepares the contents of an EIR and the County Board of Supervisors' express finding the second revised FEIR reflected its independent judgment. It nevertheless contends "there is no substantial evidence [the] County conducted a detailed review and critique of the [developer's] submissions[,]" and argues the record, therefore, does not support the County's finding.

The trial court concluded the record evidenced the opposite, and we agree. Although it appears some of the technical analyses relied on by the second revised FEIR were prepared at the developer's request, that is commonplace and does not run afoul of CEQA's mandates. (See *Eureka, supra,* 147 Cal.App.4th at p. 369; *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446, 1453-1455 (*La Vina*).) The document itself indicates it was prepared by a consultant on the County's behalf. Once it

was finalized, the County held two public hearings—one before the Planning Commission and the other before the Board of Supervisors. At both, County staff presented detailed reports stating, among other things, its belief the second revised FEIR satisfied CEQA's requirements and adequately addressed the deficiencies identified during the first appeal. And among the materials provided to the Board of Supervisors prior to certification of the second revised FEIR were the many public comments the County received throughout the process.

Protect emphasizes that the County did not directly respond to the public comments; instead, responses came from the developer's representatives by way of multiple letters submitted to the County the day before, and the same day, the Board of Supervisors held a public hearing. But draftsmanship is of no import. (*La Vina*, *supra*, 232 Cal.App.3d at pp. 1455-1456.) It is easy to see why. Any member of the public, including a project applicant, may submit comments to a lead agency up to the time the governing body holds its public hearing on the matter and certifies the environmental document. With controversial projects, such as this one, it is not uncommon for public comments to amount to hundreds or even thousands of pages. Requiring the lead agency to personally respond to each and every one could indefinitely delay a final determination, a result not contemplated by CEQA. (See *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007 149 Cal.App.4th 91, 111 ["'CEQA [is] not to be "subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement""].)

In sum, substantial evidence demonstrates the County exercised independent review and judgment over the second revised FEIR.

## DISPOSITION

The order is affirmed. Respondents are entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.